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IN THE

Supreme Court of the United States

October Term, A. D. 1930

No. 231

DAVID BURNET, *Commissioner of Internal Revenue,*
Petitioner,

vs.

CHICAGO RAILWAY EQUIPMENT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

W. S. OPPENHEIM,
HENRY W. PRICE,
Counsel for Respondent.

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The opinion of the Board of Tax Appeals is reported in 13 B. T. A. 471, and the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, reversing the decision of the Board, is reported in 39 Fed. (2d) 378.

Jurisdiction.

The order of redetermination of the Board of Tax Appeals was entered February 21, 1929. (Rec. 114.) The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered March 27, 1930. (Rec. 127.) The petition for a writ of certiorari was filed June 27, 1930, and was granted on October 13, 1930. (Rec. 128.) The jurisdiction of this court rests on Section 240 (a), as amended, of the Judicial Code (U. S. C. Title 28, Sec. 347 (a).

Statutes involved.

The statutes involved are set out in the appendix.

Statement.

Respondent agrees with the petitioner's statement of the case, save that the petitioner has failed to state that in the letter of the Solicitor of Internal Revenue sent respondent on December 7, 1925, these significant words are found:

> "If the waiver forms are not executed and returned to this office immediately, the Commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of Section 274 (d) of the revenue act of 1924." (Rec. 72.)

It was under this implied threat that the respondent was induced to forward the waiver of December 10, 1925.

Summary of Argument.

1. Under the express terms of the waiver, the right to make assessment thereunder expired on December 31, 1926.

2. The language of Section 278 (c) of the Revenue Act of 1924, standing alone, under any reasonable construction limits the power of the Commissioner to sign a waiver to instances where the Statute of Limitations has not expired. In addition to other considerations, this view is supported by the language "where both the Commissioner and the taxpayer *have consented.*"

3. Section 278 (e) of the Act deprives the Commissioner of the right to sign such a waiver as to taxes barred when the Act was passed. It would be absurd, in the view of such a provision, to so construe Section 278 (c) as to empower the Commissioner to execute such a waiver after the statute had subsequently run.

4. Considering Section 278 (c) in *pari materia* with other provisions of the 1924 Act and of the 1926 Act, a con-

struction which permits the Commissioner to sign after the statute has run, results in several absurd and inequitable distinctions. Such a construction will not be adopted if it can be avoided.

Examples of absurdities and inconsistencies resulting from the Commissioner's construction are:

(*a*) The Commissioner may sign such a waiver after the statute has run as to 1918 taxes if the return was filed June 3, 1919, but not if the return was filed June 1, 1919.

(*b*) After February 26, 1926 (the passage of the 1926 Act), the Commissioner could not sign a waiver as to any taxes for 1919 or prior years which were then outlawed, but if between June 2, 1924 (the passage of the 1924 Act) and February 26, 1926, the Commissioner had signed such a waiver as to outlawed 1919 taxes and as to 1918 taxes that became outlawed after June 2, 1924, then as to such 1919 and 1918 taxes, and *as to those only*, such a waiver, executed *only between those dates*, was good.

(*c*) The refund extension provisions of Section 281 of the 1924 Act as amended on March 3, 1925 would apply in favor of a 1918 taxpayer who executed a waiver before the tax was outlawed, but against a taxpayer for the same year who signed the waiver after the tax was outlawed.

5. After the Commissioner has made his determination and an appeal has been taken to the Board of Tax Appeals and after the statute has run, the Commissioner has not authority to sign a waiver. His function thereafter is merely to assess as directed by the Board.

6. The waiver was obtained from the taxpayer under duress—under a threat of a jeopardy assessment which the Commissioner had the power to make, although he had no right to do so.

ARGUMENT.

I.

By the terms of the waiver, the right to make the assessment expired December 31, 1926.

It is hardly necessary to state that the waiver having been drawn by the Commissioner must be construed most strongly against him. It is therein stated:

> "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals, then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board." (Rec. 73.)

As stated by the petitioner's counsel, this waiver appears to be on the standard mimeograph form regularly used by the Commissioner. The form, unquestionably, was prepared with reference to waivers which would be made before the Commissioner had made his determination and before an appeal was taken to the Board of Tax Appeals. Therefore the latter part of this waiver referring to the sending out of a deficiency notice and the taking of an appeal to the Board of Tax Appeals must be considered as having no proper reference to the conditions confronting the parties. It is undenied that no notice of deficiency was sent and appeal taken after the execution of this waiver of December 10, 1925. (Rec. 73.) Such action had been taken months before the waiver had been requested by the Commissioner. The

only term, then, of the waiver which can be effective is that the Commissioner may make an assessment against the taxpayer at any time prior to December 31, 1926, but as stated in the waiver, his right to do so "*shall then expire.*" It cannot be justifiably contended that this waiver can be extended beyond its terms. There is no statute of which we are aware which attempts to do such a thing and it certainly would be in violation of the intention of the parties to extend the time for the making of this assessment to the time when it is expressly agreed that it should not be made.

If any authority is needed on the proposition that the right given by the waiver expires at the time stated therein, it is found in the decision of this court in *Florsheim Bros. Dry Goods Co.* v. *United States*, 280 U. S. 453, 466, where it is stated:

> "At the time when the waivers were executed, the Commissioner was without power under the statute to assess or collect the taxes *after the statutory period as extended by the waivers.*" (Italics ours.)

Such also was the holding of the Board of Tax Appeals in *Aiken* v. *Commissioner*, 10 B. T. A. 553, 561-562. In the quotation from this case appearing in petitioner's brief this language is used:

> "It is clear that these agreements would have validated any assessment made after their effective date and prior to the expiration of the agreed period."

Without conceding the applicability of that decision to the point in support of which it is cited, it is clear that whether the decision is applicable or not, its effect is that the waiver loses its force upon the date fixed therein.

II.

Under the Act of 1924, the Commissioner is without authority to sign a waiver after the Statute of Limitations has run.

Counsel for the Commissioner, in their discussion of this question, have referred the Court to a portion of their revised brief in *Stange* v. *United States*. On our own part we ask that the briefs filed on behalf of the taxpayer and by the *amicus curiae* in that case shall be considered in arriving at a decision in this case so far as the same are applicable. We refer particularly to pages 19 to 29 of the original brief filed on behalf of the petitioner and pages 13 to 18 of the brief of the *amicus curiae*.

We apprehend that every argument upon the point under discussion, available to the taxpayer in that case is available to the respondent here, but there are other considerations clearly applicable to this case, some of which we believe are also applicable in the *Stange* case, but as to others of which the applicability is not so clear. The *Stange* case arose under the Revenue Act of 1921 in connection with the taxes for 1914. The instant case arises under the Revenue Act of 1924 in connection with the taxes of 1918.

In the Act of 1924 the authority of the Commissioner to sign a waiver is found in Section 278 (c) which is as follows:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Under this provision it is clear, and we believe it is not disputed, that the Commissioner must join in the waiver and his only authority for so joining is to be found in this provision.

Does this subsection (c) authorize the Commissioner to sign such a waiver after the statute has run? We cannot better answer this question than by quoting the language used by the Court of Appeals of the District of Columbia in the case of *Joy Floral Co.* v. *Commissioner*, 29 Fed. (2d) 865. This case arose under the 1924 Act and involved the taxes for the year 1919 and the question before the Court was whether a waiver executed after the statute had run was a valid waiver. The Court say:

> "Furthermore, section 278 (c) *supra*, provides that the written consent for a later assessment shall not be operative unless signed by the Commissioner as well as by the taxpayer. This provision plainly contemplates that the consent shall be executed at a time when the Commissioner still possesses the authority to make an assessment and when he may refuse to consent to any delay in making it. For it does not seem that the Commissioner's consent would be deemed important after he has been barred by statutory limitations from making any assessment. This view is favored also by the grammatical construction of the words of sections 277 and 278 when construed together. The first section provides that the assessment shall be made within five years after the filing of the return. The second section provides that if 'the Commissioner and the taxpayer have consented in writing' to a later assessment the tax may be assessed at any time within the period agreed upon. The phrase 'have consented,' as thus employed, fairly implies that a completed consent shall have been given before the expiration of the period first provided for. It may be added that this limitation is designed to provide for the orderly administration of the government's finances as well as for the protection of the taxpayer. Such a purpose would not be subserved if the Commissioner and the taxpayer could afterwards agree to the making of an assessment utterly regardless of any time limitation."

This decision was followed by the Circuit Court of Appeals for the Seventh Circuit in *Pictorial Printing Co.* v. *Commissioner*, 38 Fed. (2d) 563. In their brief in the *Stange* case, counsel for the Commissioner comment on this decision as

follows (p. 13): "With little discussion it also apparently applied the reasoning of the court in the *Joy Floral* case to the provisions of Section 250 (d) of the Act of 1921."

From the decision itself it is perfectly clear that whatever opinion may be held as to the brevity of discussion, the Court gave the question very careful consideration, referring among others to the decision of the Court of Claims in the *Stange* case itself. The language of the decision in this connection is as follows:

> "But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity. The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectible. Among others of the Board's opinions there was cited in support *Joy Floral Company*, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective if entered into after the period of limitation had expired. *Joy Floral Co.* v. *Commissioner*, 29 F. (2d) 865. This decision was followed in *Spears & Co.* v. *Heiner, Collector*, D. C. Pa. 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in *Columbia Iron Works* v. *Brook, Collector*, September 28, 1929. But in a more recent case, in the U. S. Court of Claims, *Stange* v. *United States*, November 4, 1929, a decision was reached in conformity with the views of the Board of Tax Appeals in its Joy Floral Co. decision.
>
> For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired."

In the instant case, decided at the same term as the *Pictorial Printing Company* case, the Court merely referred upon this point to its decision in the last named case.

The reasoning of these opinions is upheld by other considerations. In our effort to apply Section 278 (c) to the facts now presented, we are apt to overlook its real purpose and intended application. The entire Section 278 is making provision in regard to the taxes of 1924 and future years. It also has in contemplation that lesser but still enormous amount of taxes not yet assessed for prior years and which are not yet barred. As to those taxes, when the words "have consented" are used, they are so used in the future tense. More accurately, they mean "shall have consented." Does that expression mean "shall have consented" before the statute has expired, or does it mean "shall have consented" before the assessment is made?

We must remember that by Section 271 of the 1924 Act it is provided that "as soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax." Considering this duty of the Commissioner in connection with the establishment of the statute of limitations and the progressive shortening of that statute in the various acts, it is clear that the intent of Congress is both to spur the Commissioner to activity and to afford increasing protection to the taxpayer. It would in a measure thwart this very clear purpose to permit the Commissioner to make these waivers after the statute had run.

We have these considerations, therefore, in addition to the sound reasoning of the court in the *Joy Floral Company* case, to support our contention that "have consented" as used in Section 278 (c) requires that the consent must be given before the statute is barred. To our thinking, such a construction must be adopted unless positive provisions to the contrary are found elsewhere in the law.

But what do we find? We find support for our own construction in Section 278 itself, and by comparison with other sections of the 1924 Act and with the Acts of 1926 and 1928

we find like support, and learn that to adopt the construction of the Commissioner will lead into absurdities and inequalities that, surely, can never have been intended.

Before referring in detail to the statutory provisions just mentioned, we think it well to refer in passing to the rule of construction already called to the attention of the Court in various briefs in the *Stange* case. That rule is that taxation statutes including provisions for limitation are to be construed most favorably in favor of the taxpayer. We quote again from the decision in *United States* v. *Updike*, 281 U. S. 489, where the Court say (p. 496):

> "In any event, we think this is the fair interpretation of the clause and the one which must be accepted, especially in view of the rule which requires taxing acts including provisions of limitations embodied therein to be construed liberally in favor of the taxpayer. *Bowers* v. *New York & A. Lighterage Co.*, 273 U. S. 346, 349."

Effect of Section 278 (e) Revenue Act of 1924.

Passing to a consideration of other statutory provisions lending aid in the construction of Section 278 (c), we first call attention to Section 278 (e). This subsection is in part as follows:

> "This section (*i. e., entire Section 278*) shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence," etc.

This subsection (e) of course makes subsection (c) inapplicable to any taxes that are already barred. In other words, the Commissioner has no authority subsequent to the passage of this Act, to sign a waiver in regard to taxes barred at the time of its enactment. See *In re* Jacobs Bros. Co., 19 B. T. A. 315. It is undoubtedly on this account that the Commissioner has abandoned his effort to collect the 1917 taxes, although those taxes were involved in the proceedings below and were mentioned in the very waiver now under discussion.

Is it to be supposed that Congress thus depriving the Commissioner of the authority to consent to taxes already barred, still contemplated, that in the future as to taxes which might subsequently become barred, the Commissioner should have such power? In the absence of words affirmatively compelling such a construction, are we not obliged to construe Section 278 (c) as requiring that the assessment must be made before the bar has attached? As an illustration of one absurdity resulting from the construction contended for by the Commissioner, it is perfectly clear that if a taxpayer for 1918 filed his return on June 1, 1919, then as to him the Commissioner was deprived of power by the 1924 Act thereafter to sign a waiver; whereas as to another taxpayer who filed his 1918 return on June 3, 1919, the Commissioner had such power. We can conceive of no ground of distinction between these two taxpayers and yet the Commissioner adopts a theory leading to this absurd distinction.

Effect of Section 278(e) Revenue Act of 1926.

Again, comparing the later Act of 1926, approved February 26, 1926, we find that Section 278(e) of that Act substantially follows the language of the same numbered section of the 1924 Act by providing that "This section shall not * * * authorize the assessment of a tax * * * (1) if at the time of the enactment of this act such assessment * * * was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this act, the Commissioner and the taxpayer agreed in writing thereto." Here again, as in the case of the 1924 Act, the Commissioner is deprived of his power to sign the written consent where "the period of limitation" has run. We do not understand that 278(e) of the 1926 Act is in this regard any different from the same section as found in the 1924 Act. It merely defines with greater particularity what is meant by the words "period of limitation" as used in the 1924 Act.

Now considering these two acts together, the necessary result from the Commissioner's construction of Section 278(e)

is this: No consent may be given by the Commissioner after June 2, 1924, to a tax that was outlawed on that date. No such consent may be given after February 26, 1926, to a tax that was outlawed on that date, but between the two dates mentioned, the Commissioner may give his consent after the statute has run, as to those taxes that become barred in the time elapsing between the said dates. The taxes for 1917 were barred on June 2, 1924. The taxes for 1920 and subsequent years were not barred on February 26, 1926. Thus the two acts taken together would single out the taxes for 1919 and those taxes for 1918 where the return was filed subsequent to June 1, 1919, as the only taxes to which the Commissioner could give his consent after the statute had run. And such consent must have been given between the two dates mentioned. Again we ask what reason can be advanced for such discrimination?

Effect of Section 281(c) of the Revenue Act of 1924, as amended.

There is still another Section of the 1924 Act which affords light upon this question. Section 281(c) of the 1924 Act, as amended on March 3, 1925, contains the following provision:

> "If the taxpayer has within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.* If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund, relating to the taxes for the taxable year 1919, shall be allowed or made, if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver, so filed, has before

> the expiration of the period thereof been extended, either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919."

The portion of the above quoted language, following the * was added by the amendment of March 13, 1925.

The clear effect of this subsection (e) was to extend the time for making claims for refund, if, before the statute of limitations had expired, the taxpayer had filed a waiver of his right to have the taxes determined and assessed within the limitation period, and such is the meaning ascribed to the original statute by Article 1307 of Regulations 65, relating to the Act of 1924. One of two consequences, therefore, necessarily follows from the provisions of Section 281(e). Either (1) Congress contemplated that the waiver provided for by Section 278(c) should be executed before the statute had run, or (2) it discriminated in favor of taxpayers who signed such waivers before the statute had run and against those who filed such waivers after the statute had run. It would appear that the taxpayer who waived the bar of the statute, which had already run, and against whom the Commissioner could not proceed, would be entitled to more consideration, if anything, than a taxpayer still subject to the action of the Commissioner. Yet, precisely the contrary is the result of this legislation if the Commissioner's view of Section 278(c) is adopted. Again we say, that no construction should be adopted which will lead to such an unreasonable result.

To sum up our discussion upon this point, we submit that Section 278(c), standing alone, and in view of its evident pur-

pose, permits the Commissioner to sign a waiver only before the taxes are barred by the Statute of Limitations; that to give the language of that section any other meaning would require clear and explicit language in other sections of the Act; that far from finding any such explicit directions, we find provisions which can only be harmonized with Section 278(c) by adopting the view which we are claiming; that if there is any ambiguity in the provision it must be resolved in favor of the taxpayer.

III.

The Commissioner has no power to sign a waiver after an appeal to the Board of Tax Appeals and after the statute has run.

Section 274(a) of the 1924 Act provides that when a deficiency letter is sent, the "deficiency shall be assessed only as hereinafter provided." Section 274(b) provides "if the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the Collector." Section 900(h) requires the Board to give both the taxpayer and the Commissioner an opportunity to be heard.

Thus, after the appeal to the Board, the powers of the Commissioner are greatly changed. Thereafter, until the decision of the Board, the Commissioner and the taxpayer are in the position of litigants. The assessment which the Commissioner must make after the decision of the Board is a mere ministerial act in compliance with the orders of the Board. It is not the result of a finding made by himself, pursuant to the law, as in the case of the original assessment or deficiency assessment.

It is entirely clear that the purpose of these waivers is to give the Commissioner the opportunity to investigate the facts and determine and assess the tax. This was indicated

by the very language of the waivers originally used, as is indicated, for instance, by the waiver quoted at pages 3 and 4 of the Government's brief in the *Stange* case. That such is the purpose of the waiver was stated in *Loewer Realty Company* v. *Anderson*, (2d C. C. A.), 31 Fed. (2d) 268, where the Court say:

> "The plain purpose of Section 278 of the Act of 1926, as that of Section 278 of the Act of 1924 and Section 250 (d) of the Act of 1921, was to give the Commissioner additional time to assess taxes if he could obtain the consent of the taxpayer."

But after the Commisioner has exhausted his powers of investigation and has made his determination, after an appeal has been taken and the statute has run, the making of the waiver has no office to perform such as was contemplated by Section 278(c).

To give to the waiver the construction contended for by the Commissioner is to convert it into an agreement that in the case then and still pending the taxpayer would not interpose the defense of the Statute of Limitations. It is not susceptible of such an interpretation. Even if it could be so interpreted, the Commissioner was without power to make it.

Giving it the utmost construction possible, the assessment to which it refers must be the assessment made as a ministerial act, pursuant to the decision of the Board. It cannot be enlarged into an agreement to give up the right the taxpayer then unquestionably possessed, and still possesses, to interpose the bar of the statute in the pending proceeding.

The decision of the Board of Tax Appeals in *Aiken* v. *Commissioner*, 10 B. T. A. 553 is not in point. The waiver referred to in the quoted language was given *before* the appeal was taken to the Board of Tax Appeals. Also, as appears from the decision in that case on appeal, 35 Fed. (2d) 620, the assessment was actually made before the statute, as extended by prior waivers, had expired. The Board of Tax Appeals was, it is true, considering the effect of a waiver given after

an assessment, and was assuming, for the sake of the argument, that the assessment was made after the statute had run. Its reasoning that in defiance of the plain language of the waiver, the parties did not actually intend that such a new assessment should be made, is, we submit entirely untenable. No authorities were cited by the Board in support of such a startling proposition and we do not believe any such can be found. The precise point discussed in the citation was not referred to in the decision by the Circuit Court of Appeals.

IV.

The threat to make a jeopardy assessment.

Why did the respondent sign this waiver at the time when, and under the circumstances in which, it was given?

The answer is found in the letter of the Commissioner's solicitor, enclosing the waiver forms, and saying that if they were not executed and returned immediately "the Commissioner may find it necessary to make assessment of the proposed deficiency under the provisions of Section 274(d) of the Revenue Act of 1924." In other words, the Commissioner threatened to make a jeopardy assessment unless the waiver was signed. The Commissioner had no right to make a jeopardy assessment after the statute had run, but he had the power to do so.

We submit, that a waiver procured from the taxpayer by such a threat is invalid. Certainly, a waiver signed under such circumstances, is not to be construed any more favorably than its exact language requires; it is not to be construed as an agreement on the part of the taxpayer to give up any defense, including that of the Statute of Limitations, which it may possess as to the then pending proceeding.

IN CONCLUSION.

The five years provided for the assessment of the tax expired June 16, 1924. Nearly nine months thereafter, and on March 14, 1925, the Commissioner made his determination of deficiency and mailed notice thereof to respondent. Thereafter, on May 6, 1925, respondent appealed to the Board of Tax Appeals. Thus the determination and the appeal took place after the statute had run. The Commissioner depends altogether upon the waiver executed on December 10, 1925, for his right to make an assessment after the decision by the Board of Tax Appeals, but this waiver, by its own terms, expired on December 31, 1926.

The decision of the lower court should be affirmed, *first*, because the waiver by its own terms expired nearly four years ago; *second*, because the waiver was given after the statute had run; *third*, because it was given after the appeal to the Board of Tax Appeals; and, *fourth*, because it was procured by the threat of a jeopardy assessment which the Commissioner had no authority to make.

Respectfully submitted,

W. S. Oppenheim,
Henry W. Price,
Counsel for Respondent.

APPENDIX.

Statutes involved.

Section 271 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 296, is as follows:

> "SEC. 271. As soon as practicable after the return is filed, the Commissioner shall examine it and shall determine the correct amount of the tax."

Section 274 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 297, provides in part:

> "SEC. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.
>
> (d) If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, such deficiency shall be assessed immediately and notice and demand shall be made by the Collector for the payment thereof. * * *"

Section 277 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 299, provides in part:

"SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

Section 278 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 299, 300 is as follows:

"SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of

this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Section 281 (e) of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 302, as amended March 3, 1925, Chap. 435, 43 Stat. 1115, 1116 is as follows:

"If the taxpayer has within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.* If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund, relating to the taxes for the taxable year 1919, shall be allowed or made, if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver, so filed, has before the expiration of the period thereof been extended, either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund, relating to the taxes for the year in respect of which the waiver was filed, shall be allowed or made, if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919."

Section 900 of the Revenue Act of 1924, Chap. 234, 43 Stat. 253, 337, is in part as follows:

"SEC. 900 (h). Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. * * *"

* The portion of the above quoted language following the asterisk was added by the amendment of March 13, 1925.

Section 278 (c) of the Act of 1926, Chap. 27, 44 Stat. 9, 59, is as follows:

> "(c) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Article 1307, Regulations 65, relating to the income tax under the Revenue Act of 1924 is in part as follows: (p. 233):

> "Where the taxpayer has within five years from the date the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. The effect of this provision is to grant to those taxpayers who, prior to the expiration of the period within which an additional assessment could be made, filed a waiver for the year 1917, an additional period in which to present their claims for refund or credit of the excess amount of the tax paid for the year 1917, with the result that in such cases the claim may be entertained if filed either on or before April 1, 1925, or within four years from the time the tax was paid. An additional period to April 1, 1925, within which the taxpayer may file his claim for the credit or refund of taxes imposed under the Revenue Act of 1918 for the year 1918 is also provided in the event the taxpayer has on or before June 15, 1924, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed."